Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DIANA FAIRECHILD,
Petitioner,

v.

UNITED AIRLINES, INC. AND
PACIFIC INSURANCE COMPANY, LTD.,
Respondents

On Petition for Writ of Certiorari to the
Supreme Court of the State of Hawaii

APPENDIX

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APPENDIX

APPENDIX "A"... MEMORANDUM OPINION, January 16, 1997, in NO. 18726, in the Supreme Court of the State of Hawaii, DIANA FAIRECHILD, Claimant-Appellant vs. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured, and PACIFIC INSURANCE COMPANY, Insurance Adjuster, Appellee.

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APPENDIX "B"... ORDER, February 5,1997, in No. 18726, in the Supreme Court of the State of Hawaii in Fairechild vs. United Airlines, Inc/Pacific insurance Company, supra, DENYING Diana Fairechild's motion for reconsideration filed on January 27,1997.

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APPENDIX "C"... ORDER GRANTING DEFENDANTS: MOTION FOR JUDGMENT ON THE PLEADINGS, December 23,1996, in NO. C-96-1775 JSB, in the United States District Court Northern District of California in DIANA FAIRECHILD, PLAINTIFF, v. UNITED AIRLINES, et.al., Defendant and filed with the Supreme Court of the Stsate of Hawaii in Fairechild's Motion for Reconsideration on January 27,1997 as Exhibit "A" thereto.

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APPENDIX "D"... COPIES OF COMMUNICATIONS BETWEEN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA AND THE SUPREME COURT OF THE STATE OF HAWAII and concerning Fairechild v. United Airlines, Inc., and Pacific Insurance Company prior to the dispositon

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of both cases in the respective Courts.

(1)..Copy of letter of November 4, 1996 from Honorable Joan S. Brennan, United States Magistrate Judge, U.S. District Court Northern District of California to the Honorable Ronald T y.Moon, Chief Justice, Supreme Court of Hawaii; Re: Fairechild b. United Airlines, et al. Hawaii Supreme Court No.18726; and related California action. Fairechild v. United Airlines, U.S.D.C No.C-96-1775-JSB.

(2).. Copy of letter of November 26, 1996 from the Supreme Court of Hawaii to the U.S District Court in response to Appendix "D" (1) and executed by Ronald T.Y. Moon, Chief Justice.

(3)..Copy of letter of December 3, 1996 from the U.S.D.C Northern District of California to the Supreme Court of the State of Hawaii in reply to Appendix "D" (2) and executed by Joan S. Bennett, United States Magistrate Judge (USDC_NDCA).

APPENDIX "E"...DECISION AND ORDER, November 2, 1994, of the LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD of the STATE OF HAWAII, Case No. AB 90-182 (2-89-02035) Diana Fairechild, Claimant-Appellant vs. United Airlines, Inc., and Pacific Insurance Company, Ltd., Employer/ Insurance Carrier-Appellee.

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APPENDIX "F"...CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.
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Filed 1/16/97

NO. 18726

IN THE SUPREME COURT OF THE STATE OF HAWAII

DIANA FAIRECHILD, Claimant-Appellant, vs. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured, and PACIFIC INSURANCE COMPANY, Insurance Adjuster-Appellee.	CASE NO. AB 90-182 (2-89-02035) APPEAL FROM DICISION AND ORDER FILED NOVEMBER 2, 1994 AND ORDER DENYING CLAIMANT-APPELLANT'S MOTION FOR RECONSIDERATION AND REOPENING OF DECISION OR [SIC] ORDER FILED JANUARY 19,1995 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

MEMORANDUM OPINION

Claimant-Appellant Diana Fairchild (Claimant) appeals the decision and order of the Labor Industrial Relations Appeals Board (LIRAB) denying compensation for "Multiple Chemical Sensitivity" (MCS) allegedly caused by her employment with Employer-Appellee United Airlines, Inc.(Employer).[1] Claimant apparently makes three arguments on appeal: (1) the LIRAB erred in concluding that the presumption of compensability does not apply; (2) the LIRAB's finding that Claimant did not suffer from the claimed injury was clearly erroneous; and (3) the LIRAB abused its discretion

[1] Employer and Insurance Adjuster-Appellee Pacific Insurance Company (Insurance Adjuster) will be collectively referred to as Appellees.

in denying Claimant's request to reopen the case to receive new evidence. For the following reasons, we affirm the LIRAB's decision and order.

I. BACKGROUND

Claimant worked as a flight attendant for Pan American World Airways (Pan Am) from 1966 to 1986. On two of her regular routes, Australia and New Zealand, local government policy required performance of a procedure known as "disinsection" before passengers and crew could disembark from arriving aricraft. During this procedure, the interior of the aircraft was sprayed with the pesticide D-phenothrin. Claimant was exposed to the pesticide every time she flew on these routes.

In January 1985, Claimant complained of an adverse reaction on a flight to New Zealand. She experience eye irritation, headaches, disorientation, and burning sensation in her nose, sinuses, and throat. Upon returning to Honolulu, she was examined by a physician who concluded that her reaction was an irritative response of the mucus membranes of her respiratory tract rather than an allergic reaction.

In February 1985, Claimant was examined by George Ewing, M.D., a specialist in allergy and immunology. Dr. Ewing administered a provocation-neutralization test using samples

of D-phenothrin supplied by Claimant. This test involves placing a diluted sample of the substance under the patient's tongue. A positive response consists of various subjective reactions. In Claimant's case, she experience shooting pains, pressure, itching, rapid heart-beat, and anxiety. A second dose produced a burning sensation in her mouth, headache, and pressure behind her right breast. Dr. Ewing diagnosed a chemical sensitivity to D-phenothrin. Later, Dr. Ewing cautioned Claimant that she could ultimately develop sensitivities to other chemicals if she continued to be exposed to pesticides.

In February 1986, Pan Am went out of business and its routes were taken oven by Employer. Claimant was hired by and began working for Employer.

In August 1986, during a lay-over in New Zealand, Claimant experience eye irritation, with dark circles and scally skin under her eyes. A doctor in New Zealand perscribed antibiotic drops and cream. Upon returning to Honolulu, another doctor diagnosed blepharitis (inflammation of the eyelids) and prescribed more medication. Employer did not dispute Claimant's workers' compensation claim for the eye irritation and paid her medical expenses.

In September 1986, after flights to Tokyo

and New York, Claimant again experienced eye problems. Although aircraft arriving in Tokyo and New York were not subjected to disinsection, Claimant asserts that her reaction was caused by pesticides residue on the carpeting and upholstery of the aircraft.

On November 26,1986, Claimant began treatment with Gregory Yuen, M.D., a psychiartrist Claimant had been having difficulty making the transition to her new employer. She was upset with the possible loss of her seniority form Pan Am, criticized her union for not adequately addressing her concerns, disliked Employer's uniforms, complained of the poor circulation in Employer's aircraft, and had difficulty learning new work procedures and getting along with her new co-workers. In addition, she had been experiencing problems in her personal and family relationships. Dr. Yuen arrived at a dignosis of "adjustment disorder with mixed emotional features." While undergoing treatment with Dr. Yuen, Claimant received a poor evaluation for various incidents, including violation of FAA rules.

On December 20, 1987, Claimant experienced another reaction on a flight to San Francisco. She complained of body ache, conjunctivitis, headaches, fever and respiratory illness.

Although Claimant had not been subjected to disinsection on the flight to San Francisco, the aircraft had made stops in New Zealand and Australia prior to stopping in Honolulu. Claimant asserts that it was during this flight that she sustained a work injury and became disables with MCS.

Following the December 20 flight, Claimant continued to complain of flu-like symptoms, including backaches, burning sensations, chest pain, conjunctivitis, coughs, depression, disorientation, dizziness, ear aches, fever, gall bladder pain, headaches, memory loss, nausea, skin sores, swollen glands, rashes, confusion and fatigue.

On Audjust 11,1988, Claimant returned to Dr. Ewing for another examination. She complained of intolerance to all antibiotics, sulfa drugs, penicillin, house dust, newsprint, tobacco smoke, perfumes, powders, insecticides, jet fuel, hair sprays, carpets, dairy products, chemical deodorants, and synthetic fibers. Based on Claimant's history, Dr. Ewing diagnosed her with MCS. He recommended avoidance of chemicals that could aggravate her condition. After consulting with Dr.Ewing, Dr. Yuen changed his psychiatric diagnosis to "organic mood syndrome" caused by her chronic MCS.

On January 24, 1989, Claimant filed the instant workers' compensation claim. Claimant asserted that she had developed MCS as a result of exposure to D-Phenothrin at work. She claimed that the exposure on December 20,1987 had caused her to become sensitive to other non-related chemical in the environment.

On September 27, 1990, a hearing was held by the Department of Labor and Industrial Relations, Disability Compensation Division (DCD). On February 23, 1990, the DCD denied Claimant compensation. Claimant then appealed to the LIRAB.

The LIRAB held hearing on July 18, September 16, and September 25, 1991. At the hearings, various witnesses testified; however, the testimony of the expert witness is most relevant to the present appeal.

Dr. Ewing, Claimant's treating physician and former chief of the allergy and immunolohy department of Sraub Clinic and Hospital, testified in favor of Claimant. Dr. Ewing testified the MCS begins with a large exposure to a particular chemical, which sets the state so that subsequent exposures to that chemical or other related or even unrelated chemicals continue to stimulate symptoms in the patient. The symptoms progressively increase even with exposure to lower levels of the chemicals. The symptoms include dizziness, headache, aches and

pains, difficulty in thinking, and other central nervous system problems. Dr. Ewing admitted that there is no specific immunologic test to determine if a patient suffers from MCS. He stated that diagnosis of MCS is accomplished through examination of the cause and effect relationship between exposure and the patient's reactions. He noted that the diagnosis is often made by exclusion, when physical examination fails to find any other cause. Dr. Ewing further testified that he diagnosed Claimant with MCS based on her history and the results of her provocation-neutralizition test. However, on cross-examination he admitted that, because he did not definitely say whether he had tested her with placebos. He further admitted that not only did he believe MCS had sensitized Claimant to a multitude of chemicals, but that it had also sensitized her to high-voltage electromagnetic fields.

Claimant also presented Steven Plavnick, Ph.D.,[2] over Appellees' objections. Dr. Plavnick professes to be an expert on "environmental illness," i.e., MCS. He was originally a patient of Dr. Theron Randolph, the founder of a school of thought known as

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[2]Dr. Plavnick is neither a medical doctor nor a psychologist; rather, his doctorate is education.

"clinical ecology," which recognizes and treats MCS. Dr. Plavnick lived with Dr. Randolph and his associates for six weeks, receiving treatment and studying Dr. Randolph's teachings. Dr. Plavnick then founded his own firm, Solutions to Living Problems, Inc., which apparently advises MCS sufferers on how to adjust their lifestyles to deal with their condition. Dr. Plavnick testified that environmental illness or MCS is "a individual's inability to tolerate some or many of the environmental chemicals is frequent use within their biospace of their immediate environment." He testified that MCS is also known as "Epstein-Barr syndrome" and "chronic fatigue syndrome." He further noted that many federal agencies have recongized MCS, including the Social Security Administration, the Department of Housing and Urban Development, the Enviromental Protection Agency, as well as state agencies in other jurisdictions.

Appellees presented John McDonnell, M.D. former chief of the allergy and immunology department of Tripler Army Medical Center and former president of the Hawai'i Medical Association. Dr. McDonnell testified:

It is my opinion that the multiple chemical sensitivity or environmental illness is a philosophy that is written extensively in lay literature similar to check-out newspaper literature that is completely unsupported in

fact and is nothing more than an unsubstantiated philosophy.

I would like to further add that the most significant feature of claimants in support of the enviromental illness concept seems to completely skirt the scientific method and do not challenge scientifically claims made by proponents. They seem to accept everything and anything that a claimant might have and then argue in circular arguments, substantiating virtually anything that could be claimed.

About Dr. Ewing, Dr. McDonnell stated:

> Dr. Ewing...has persisted in championing this belief in clinical ecology with almost religious zeal, contrary to all evidence to the contrary substantiated by numerous scientific studies and evaluations by many academics, including the California Medical Association, the American Academy of Allergy and Immunology, and on and on.

Dr. McDonnell criticized the methodology used by proponents of MCS. He noted:

> In this particular illness or philosophy --I don't consider it a science--the patients present an illness and already have an explanation. Now. many times they don't have an explanation but the explanation almost invariably seems to be that of someone else's fault that then makes these people victims and they can then explain all other inadequacies in their life based on this situation of having been victims.
>
> The difference her is that in environmental illness, the patient's associations are accepted as fact, when, in point of fact, in allergy and immunology, most patients come in with an idea that something is bothering them and it turns out not to be the case.

Dr. McDonnell also criticized the provocation-neutralization test. He noted that it is not

a scientifically reproducible test. The test relies on subjective responses from the patient, rather than objective responses as in conventional allergy test. Therefore, the test results can be affected by the biases of the patient. Furthermore, Dr. McDonnell criticized the manner in which Dr. Ewing administered the test to Claimant. Because the test was not conducted as a double-blind study,[3] the biases of the person administering the test, i.e., Dr. Ewing, could have affected the results. In addition, because nothing was done to mask the taste of the pesticide sample, Claimant could have been able to distinguish the pesticide from placebo based on taste, thus leading to her subjective reactions. Dr. McDonnell finally stated that he believed Claimant suffered from no injury at all.

Appellees also called Eric Comstock, M.D., a medical toxicologist, as a witness. Dr. Comstock testified:

> My opinion of the concept of environmental illness, the basic premise of environmental illness--and I equate this to clinical ecology --is that--that it is more of a belief system than it is a dynamic of--of body interaction or of a disease process.

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3. In a double-blind study, neither the test subject nor the test administrator know whether any given dose is the actual substance or a placebo.

Dr. Comstock stated that clinical ecologists attempt to treat MCS with so-called avoidance therapy by advising the patient to avoid exposure to chemicals in their environment. However, Dr. Comstock noted that the human body contains and produces its own chemicals and that, for this reason it, it is impossible to completely avoid chemicals. Furthermore, Dr. Comstock diagnosed Claimant's condition as an "iatrogenic chemophobic anxiety reaction." In Dr. Comstock's view, Claimant suffered from a fear of chemicals, induced by her physician's diagnosis of MCS, which in turn pricipitated ;anxiety attacks. Dr. Comstock finally stated that, in his opinion, Claimant had sustained no organic injury.

On April 30,1993, Claimant filed a motion to reopen the evidentiary portion of the case. The LIRAB denied the motion on May 25,1993. Claimant filed another motion to reopen the evidentiary portion of the case on September 13, 1994. On September 20, 1994, the LIRAB held a hearing on the motion and then denied it on the same date.

On November 2, 1994, the LIRAB filed its decision and order denying Claimant compensation. In its findings of fact (FOFs), the LIRAB found that Claimant did not suffer from an injury as claimed. In FOF No. 37,

the LIRAB summarized Dr. McDonnell's testimony and entered the following finding: "[Dr. McDonnell] opined...that Claimant did not suffer any organic injury from exposure to insecticide beyond that of eye irritation. We credit Dr. McDonnell's opinion." In FOF No, 38, the LIRAB summarized Dr. Comstock's testimony and entered the following findings: "[Dr. Comstock] opined...that CLaimant does not currently suffer from any organic illness as a result of her chemical exposure at work ...We credit Dr. Comstock's opinions." Thus, the LIRAB found that Claimant did not suffer from the claimed injury: "On the record before us, we [find] that the claimed injury has not been established due to the lack of reliable or proven medical or scientific basis to support or confirm the diagnosis of MCS." [4] Based on its FOFs, the LIRAB entered the following COLs: "Accordingly, having [found] that Claimant has failed to establish the injury for which she claims compensation, we

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4. We note that this statement is an implicit FOF buried within the conclusion of law (COL) section of the LIRAB's decision and order. Even if a FOF is denominated a COL, it is still a FOF and must be reviewed under the clearly erroneous standard. Bumanglag v. Oahu Sugar Co., Ltd. 78 Hawai'i 275, 278 n. 2d 468, 471 n. 2 (1995) (citing Molokai Village Dev. Co., Ltd. V. Kauai Elec. Co. Ltd., 60 Haw. 582, 593 P.2d 375 (1979).

are unable to conclude that Claimant sustained an unjury on December 20, 1987, as a result of exposure to D-phenothrin at work." Therefore "[w]e conclude that Claimant did not sustain an injury on December 20, 1987, arising out of and in the course of employment."

Claimant then filed a motion to reconsider and reopen the decision on December 1, 1994. The LIRAB denied the motion on January 19,1994. On February 9, 1995, Claimant filed a notice of appeal to this court.[5]

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[5] Claimant's notice of appeal states that she is appealing pursuant to HRS§ 386-88. However, because Claimant filed a motion to reconsider and reopen prior to filing the notice of appeal, HTS §386-88 must be read in conjunction with HRS §386-87. HRS §386-87 provides that a party may move to reopen the case within 30 days of the decision and order. HRS § 386-87 (d) (1993). If the motion is denied, "the time to initiate judicial review shall run from the date of mailing of the denial decision." Id. In other words, a timely motion to reopen under HRS §386-87 tolls the period in which to appeal under HRS §386-88. The period in which to appeal under HRS § 386-88 is 30 days. HRS § 386-88 (1993).

In the present case, November 2, 1994 is the date of the decision and order. The motion for reconsideration and reopening was filed on December 1, 1994 and was therefor timely. The motion was denied on January 19,1995 and the notice of appeal was filed on February 9, 1995. Therefore, this appeal is timely.

II. STANDARD OF REVIEW

In reviewing decisions of the LIRAB, the standard of review is determined by HRS §91-14(g), which provides:

> Upon review of the record the court may affirm the decision of agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
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> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

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5 continued

We further note that nothing in HRS §386-87 indicates that judicial review after denial of a motion to reopen is limited only to the denial of the motion itself and cannot address the underlying decision and order. In construing statutes, the fundamental starting point is the language of the statute itself. State v. Taoyomura, 80 Hawai'i 8, 18, 904 P2d 893, 903 (1995). Where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning. Id. Therefore, we hold that a party whose timely motion to reopen is denied can then appeal not only the denial of the motion, but the underlying decision and order as well.

In the present case, Claimant's notice of appeal states that she is appealing "from the Order Denying Claimant-appellant['s] Motion

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(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g) (1993). This court has interpreted HRS § 91-14(g) to mean that:

[C]onclusions of law are reviewed under subsections (1), (2), and (4); questions regarding procedural defects are reviewed under subsection (3); findings of fact are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6).

ZEMIS V. SCI Contractors, Inc., 80 Haw.442, 445, 911 P. 2d 77 (1966) (citing Loui v. Board of Medical Examiners, 78 Haw. 21, 25, 889 P.2d 705, 709 (1995, Furthermore:

[A]ppeals taken from findings [of fact] set forth in decisions of the Board are reviewed under clearly erroneous standard. Thus, the court considers whether such a finding is [c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.] The clearly erroneous standard requires this court to sustain the Board's findings unless the court is left with a firm and definite conviction that a mistake has been made.

A conclusion of law...is not binding on an appellate court and is freely reviewable for its correctness. Thus, this court reviews [conclusions of law] de novo, under the right/wrong standard.

Atchley v. Bank of Hawai'i, 80 Haw. 239,242, 909 P.2d 567, 570 (1996) (quoting Bumanglag v. Oahu Sugar Co.,Ltd., 78 Haw. 275,279, 892 P.2d 468, 472(1995)). A court or agency

abuses its discretion "when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Bettencourt v. Bettencourt, 80 Haw. 225,231, 909 P. 2d 553,559 (1995)(quoting Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 251, 861 P.2d 1,3 (1993)).

III. DISCUSSION

HRS § 386-3 provides in relevant part:

> Injuries covered. If an employee suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as hereinafter provided.

HRS § 386-3 (1993). Claimant asserts that she should receive compensation because she suffers from an "injury", namely, MCS.

A. Whether the LIRAB Erred in Concluding that the Presumption of Compensability Does Not Apply

Although Claimant's argument is not a model of clarity, she appears to argue that the statutory presumption of compensability requires that all doubts on questions of fact be resolved in favor of the claimant.

HRS § 386-85 provides in relevant part: "Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary: (1) That the claim is for a covered work injury[.]" HRS § 386-85 (1993). Claimant cites a numb er of our cases for the proposition that the presumption applies to the factual determination of whether an injury exista: Akamine v. Hawaiian Packing & Crating Co.,53 Haw. 406, 495 P.2d 1164 (1972); DeFries v. Assoc. of Owners, 57 Haw. 296, 555 P.2d 855 (1976); Accoustic, Insulation and Drywall, Inc. v. Labor & Indus. Relations Appeal Bd. 51 Haw. 312, 459 P. 2d 541 (1969), reh'g denied, 51 Haw. 632, 466 P.2d 439 (1970); and Lawhead v. United Airlines, 59 Haw. 551, 584 P.2d 119 (1978). Claimant quotes the following statement from Akamine: "The beneficient and liberal purposes of the statute require that doubts be resolved in favor of the claimant." Akamine 53 Haw. at 414, 495 P.2d at 1169. Claimant argues that in the present case, even though there was doubt as to whether Claimant actually suffered from the claimed injury, the

presumption of compensability required the LIRAB to find in favor of Claimant.

The LIARB, in its decision and order, concluded that the presumption does not apply to this case. The LIARB held:

"[A] claimant may not avail himself[of] the statutory presumption that an injury arose from employment, unless the injury or evidence is of such has first been established ...Therefore, before we can even apply the presumption to determine causation in this case, we must first determine whether Claimant has an injury." We agree with the LIARB. In all of the cases cited by Claimant, the presumption was applied to the issue of whether the injury was work-related, not to the issue of whether the injury existed at all. For example, the claimant in Akamine suffered a heart attack at work and died. Akamine, 53 Haw. at 407, 495 P. 2d at 1164. The presumption was applied to resolve the question of whether the injury was work-related. Insofar as the claimant actually died, it is clear that the presumption was not applied to the issue of whether the injury existed. In fact, Akamine expressly states, in a passage that Claimant herself quotes in her briefs, that "if there is a reasonable doubt as to whether an injury

is work-connected, the humanitarian nature of the statute demands that doubt be resolved in favor of the claimant." Akamine, 53 Haw. at 409, 495 P.2d at 1166 (emphasis added).

Therefore, in the present case, the HRS § 386-85 presumption does not apply. The LIARB first had to make the factual determination as to whether Claimant suffered from an injury as claimed.

B. WHETHER THE LIARB'S FINDING THAT CLAIMANT DID NOT SUFFER FROM THE CLAIMED INJURY WAS CLEARLY ERRONEOUS.

Claimant argues that the LIARB's finding that Claimant did not suffer from the claimed injury was clearly erroneous. We disagree.

In cases of conflicting evidence, the credibility of the witnesses and the weight to be given to their testimony are within the province of the finder of fact and will not generlly be disturbed on appeal. Carlos v. MTL, Inc., 77 Haw. 269, 276, 883 P.2d 691,698 (App. 1994) (citing Amfac, Inc. v. Waikiki Beachcomber Investment Co.,74 Haw. 85,117-18 839 P.2d 10,28, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992)).

The evidence presented to the LIARB was highly conflicting. Drs. Ewing and Plavnick essentially testified that MCS is an organic

disease and that Claimant suffered from an injury. On the other hand, Drs. McDonnell and Comstock testified that MCS is not an organic disease and that Claimant did not suffer from an injury as claimed. The LIARB found Drs. McDonnell and Comstock to be more credible and gave their testimony more weight in the factual determination at issue in this case. The LIARB apparently credited Dr. McDonnell's testimony that clinical ecologists "seem to accept everything and anything that a claimant might have and then argue in circular arguments, substantiating virtually anything that could be claimed." The LIARB clearly did not find Dr. Ewing's testimony credible in that [t]he diagnostic methods and treatment of MCS, which Dr. Ewing subscribes to and used in this case, have not been proven to be reliable, effective, or scientifically valid." Thus, the LIARB found that Claimant does not suffer from an injury as claimed.

As an appellate court, we can overturn the LIARB's finding only if we are left with a firm and definite conviction that a mistake has been made. We are not left with such a conviction. There appears to be no consensus within the medical community on MCS; thus, we cannot say that we are left with a firm and definite conviction that MCS is an organic disease and

that Claimant has an injury as claimed. We refuse to disturb the factual findings of the LIARB.[6]

Therefore, the LIARB's finding that Claimant did not suffer from the claimed injury was not clearly erroneous.[7]

C. WHETHER THE LIARB ABUSED ITS DISCRETION IN DENYING CLAIMANT'S REQUESTS TO REOPEN THE CASE TO RECEIVE NEW EVIDENCE

Claimant made three attempts to reopen the case to receive new evidence. She filed a motic motion to reopen the evidentiary portion of the case on April 30, 1993; a second motion to reopen the evidentiary portion of the case on September 13, 1994; and a motion to reconsider and reopen the decision on December 1, 1994. The LIARB denied all three motions. Claimant argues that the LIARB abused its discretion because "the field of enviornmental illness is subject to rapid development, and it would benefit the interest of justice to receive valuable documentation which was not available during the discovery period."

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6 Claimant also argues that the LIARB found in FOF No. 31, Claimant denies suffering from a psychological injury and, therefore, did not make a claim for psychological injury. Consequently, this opinion does not address whether MCS qualifies as a psychological injury or whether the claim in the present case would be compensable as a psychological injury. This opinion only addresses Claimant's contention that MCS is an organic disease.

The LIARB has very broad discretion in admitting evidence. Hawai'i Administrative Rules (HAR) § 12-47-41 provides:

> Rules of Evidence. The board shall not be bound by statutory and common law rules relating to the admission or rejection of evidence. The board may exercise its own discretion in these matter, limited only by considerations of relevancy, materiality, and repetition, by the rules of privilege recognized by law, and with a view to securing a just, speedy, and inexpensive determination of the proceedings.

Both Claimant and Appellees cite Bank of Honolulu v. Davids, 6 Haw App. 25, 709 P.2d 613 (1985), asserting that a three-factor test should be applied when deciding whether a new

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7 Courts in other jurisdictions have also refused to disturb administrative decisions denying compensation for MCS. See, e.g., Weekly v. Industrial Comm'n, 615 N.E. 2d 59 (Ill. App. Ct. 1993); Conradt v. Mt. Carmel School, 539 N.W. 2d 713 (Wis. Ct. App. 1995). But see Armstrong v. City of Wichita, 907 P. 2d 923 (Kan.Ct.App.1995); Appeal of Kehoe, 648 A 2d 472 (N.H. 1994) appeal after remand, No. 95-316, 1996 WL 655656 (N.H. Nov.13,1996).

We also note that, as the LIRAB found in FOF No. 31, Claimant denies suffering from a psychological injury and, therefore, did not make a claim for psychological injury. Consequently, this opinion does not address whether MCS qualifies as a psychological injury or whether the claim in the present case would be compensable as a psychological injury. This opinion only addresses Claimant's contention that MCS is an organic disease.

trial should be granted based on newly discovered evidence.[8] However, the present case involves the reopening of an administrative proceeding by the LIRAB, not the granting of a new trial by a trial court. HAR § 12-47-41 expressly states that, unlike a trial court, the LIARB is not bound by statutory and common law rules regarding the admission or rejection of evidence. Therefore, we will not apply the Davids test to the present case.

According to the text of HAR § 12-47-41, in admitting or rejecting evidence, the LIARB is bound only by considerations of relevancy, materiality, and repetition, and should seek the just, speedy, and inexpensive determination of the proceedings. Claimant submitted memoranda in support of her motions and attached the actual exhibits that she sought to introduce into the record. For the most part, these exhibits consist of articles from various popular magazines that summarize the debate over MCS. The exhibits also include

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8 In Davids, the Intermediate Court of Appeals (ICA) listed the following factors: (1) The evidence must be previously undiscovered even though due diligence was exercised; (2) The evidence must be admissible and credible; and (3) The evidence must be of such a material and controlling nature as will probably change the outcome and not merely cumulative or tending onlu to impeach or contradict a witness.
Davids, 6 Haw App. at 33, 709 P.2d at 620

correspondence with elected officials, newsletters from activist organizations, and videotapes of television news programs.

Having reviewed the exhibits submitted by by Claimant, we believe they add little or nothing to the case. The exhibits may indeed be "new" in the sense that they did not exist at the time of the LIARB hearings. However, they are also repetitious. The expert witnesses at the hearings more than adequately described the dispute over the validity of MCS. Thesupplementary exhibits submitted by Claimant do nothing more thanrepeat the information in the testimonyof the expert witnesses. Because these exhibits were merely cumulative, non-expert recapitulations of the views advanced by the expert witnesses, it is highly unlikely that they would have affected the outcome of the case. Furthermore, allowing the Claimant to repeatedly reopen the case and submit new exhibits would have impaired the speedy determination of the proceedings.

IV CONCLUSION

Accordingly, we affirm the LIARB's decision and order denying compensation to Claimant.

DATED: Honolulu, Hawai'i January 16,1997.

Signed:
RONALD T.Y. MOON
ROBERT G. KLEIN
STEVEN H.LEVINSON
PAULA A NAKAYAMA
MARIO R. RAMIL

On the briefs:
Teresa Tico and Joseph Ryan
for Claimant-appellant

Roland Q. F. Thom and
Laurie E. Keeno
for employer-appellee,
self-insured, and insurance
adjuster-appellee

NO. 18726

IN THE SUPREME COURT OF THE STATE OF HAWAII

DIANA FAIRECHILD, Claimant-Appellant, vs. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured, and PACIFIC INSURANCE COMPANY, Insurance Adjuster- Appellee.	CASE NO. AB 90-182 (2-89-02035) APPEAL FROM DICISION AND ORDER FILED NOVEMBER 2, 1994 AND ORDER DENYING CLAIMANT-APPELLANT'S MOTION FOR RECONSIDERATION AND REOPENING OF DECISION OR [SIC] ORDER FILED JANUARY 19,1995 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

ORDER

Upon consideration of claimant-appellant's motion for reconsideration filed on Jan. 27, 1997,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawaii, February 5, 1997.

Signed:

RONALD Y.T. MOON
ROBERT G. KLEIN
STEVEN H LEVINSON
PAULA A NAKAYAMA
MARIO R. RAMIL

Teresa Tico and
Joseph Ryan on
the motion.

FILED DEC. 20, 1996
Richard W. Wieking
Clerk, U.S. District Court
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DIANA FAIRECHILD Plaintiff, v. UNITED AIRLINES, et al Defendants	) No. C-96-1775 JSB)) Order Granting Defendants') Motion for Judgment on) the Pleadings))))))

Plaintiff, Diana Fairechild (Fairechild) filed this diversity action against United Airlines (United) on February 27, 1996 claiming a violation of California Labor Code section 3602(b)(2)(aggravation of work-related injury by employer's fraudulent concealment) and intentional infliction of emotional distress. Fairechild workde as a flight attendant for Pan American World Airways,Inc. (Pan Am) from 1966 until January 1986 based in Honolulu, Hawaii. In January 1986, when United bought Pan Am's routes, Fairechild began working for United in the same capacity as she had worked for Pan Am. She left that position in December 1987 as a result of a claimed disability, Multiple Chemical Sensitivity Syndrome (MCS), allegedly caused

by her exposure to a chemical called D-Phenothrin, an insecticide used inside aircrafts, while working for United. She alleges that this injury occurred from a direct exposure to the insecticide during an August 1986 flight from Honolulu to New Zealand and from a secondary exposure on a flight from Honolulu to San Francisco in December 1987.

In January 1989, Fairechild filed a workers' compensation claim against United in Honolulu. This claim was denied. Upon administrative appeal, Fairechild's claim was denied again based on lack of a medical or scientific basis to prove a diagnosis of MCS. Fairechild appealed that decision to the Hawaii Supreme Court. That appeal is pending.

THIS MOTION

United has filed two motions (1) a Rule 12 motion for judgment on the pleadings,[1] and (2) a motion to stay this action pending the outcome of the appeal currently before the Hawaii Supreme Court (due to the danger of inconsistent results).

On December 5, 1996, both parties appeared before this court for a hearing on the matter. United was represented by Phillip R. Diamond. Fairechild was represented by Thomas J. Kaster (Kaster). Both parties would stipulate to a stay of the proceedings pending the Hawaii

1 References to "Rule" are to the Federal Rules of Civil Procedure

appeal. However, United contends that its motion for judgment on the pleadings should be granted, thus obviating any need to stay these proceedings.

ANALYSIS

A. The parties' positions

1. Defendant/moving party United

United claims that its motion for judgment on the pleadings should be granted because the real issue in this diversity action is choice of law. The applicable law here is Hawaii law, which bars the present action. Under California's choice of law rule, a governmental interest approach is used to determine which state's law should be applied. Hawaii's law should be applied because only Hawaii has an interest in applying its law to this case. If Hawaii's workkers' compensation statute is applied, this action is barred by Hawaii's exclusive remedy provision.

2. Plaintiff Fairechild

Fairechild asserts that there is no true conflict of law or choice of law issue here. The forum state has an interest in applying its own law, and the law of the forum "will be displaced only if there is a compelling reason for doing so." Kasel v. Remington Arms Co., 24 Cal. App. 3d 711,731 (1972). There is no compelling reason to apply Hawaii law since California is the forum state and the injury occurred during

a United flight from Honolulu to San Francisco. California has an interest in applying its own law to deter employers doing business in the state from fraudulently concealing and aggravating work injuries which arose in part in California. A recent decision of the Hawaii Supreme Court, Hough v. Pacific Ins. Co., Ltd., 1996 WL 680234(Haw. Nov.26, 1996), greatly erodes Hawaii's exclusive remedy provision and therefore, even if Hawaii's law is to be applied, a stay of proceedings is appropriate.

B. GROUNDS FOR GRANTING JUDGMENT ON THE PLEADINGS.

A motion for judgment on the pleadings should be granted when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice.[2] 5A Charles A. Wright & Arthur R. Miller, Fed. Prac. & Procedure: Civil 2d § 1367 (2d ed. 1990). The complaint must be construed in the light most favorable to plaintiff, and all material allegations in the compllaint must be accepted as true. McGlinchy v. Shell Chemical Co., 845 F. 2d 802, 810 (9th Cir. 1988).

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2 United requests that the court judicially notice facts and law pursuant to Rule of Evidence 201, which mandates that the court take judicial notice if requested by a party and is supplied with the necessary information. United has pro-

United's motion for judgment on the pleadings should be granted because the outcome of the case is determined by whether California or Hawaii workers' compensation law applies. United is correct in contending that the court must look to California choice of law rules to determine which state's substantive law applies For the reasons stated below, Hawaii's substantive law applies, thereby barring this action.

1. California's Choice of Law Rule

A district court in a diversity case must apply the same choice of law analysis that a state court in the same jurisdiction would apply. Liew v. Official Receiver & Liquidator, 685 F.2d 1192 (9th Cir. 1981). California applies the

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2 continued
vided the court with the proper documentation and supporting evidence so that this court takes judicial notice of the following:

(1) On January 19, 1989, Fairechild filed a workers' compensation claim against United in Honolulu, Hawaii, alleging that she suffered "[s]econdary exposure to pesticides via carpets, seat fabrics, etc. and direct pesticide exposure in Australia and New Zealand while a flight attendant."
(2) Hawaii's Workers' Compensation Law, embodied in Hawaii Revised Statutes section 386-5 and 386-6, which provides in pertinent part, that workers' compensation is the exclusive remedy for a work injury.
(3) United is incorporated in the State of Delaware and has its principal place of business in Illinois.

"governmental interest' approach in a choice of law analysis, the objective of which is "to determine the law that most[3] appropriately applies to the issue involved." Offshore Rental Company, Inc., v. Continental Oil Co. 22 Cal 3d 157, 161 (1978). The "governmental interest" approach involves a three-step analysis in determining whether a choice of law question exists: (1) determination of whether the potentially concerned states have different laws, (2) consideration of whether each of the states has an interest in having its law applied to the case, and, if the laws are different and each has an interest in

3 Fairechild mistakenly claims that the law of the forum state may be displaced only if there is a compelling reason, relying on Kasel v. Remington Arms Co., 24 Cal.App. 3d 711,731 (1972). The "compelling reason" language in Kasel however, is no longer controlling law. The Second District expressly denounced the "compelling reason" language of Kasel in Cable Sahara Tahoe Corp., 93 Cal App. 3d 384 (1976), which made clear that the forum law is only a consideration in the "preliminary analysis" to identify whether a "true conflict" exists. Cable, 93 Cal. App.3d at 393-94 (citing Bernherd, 16 Cal. 3d at 320). See also Camp Forwarders Transport, Inc., 537 F.Supp. 636 638-39 (C. D. Cal. 1982) holding that such a preference would be inconsistent with California's governmental interest approach once a party timely invokes the law of a foreign state and shows application of that law will further an interest of the foreign state).

having its law applied, (3) which state's interests would be more impaired if its policy were subordinated to the policy of the other state. Sommer v.Gabor 40 Cal. App. 4th 1455,1467 (1995). See also Offshore Rental Co. Inc. 685 F.2d at 1196. Thecourt may make its own determination of the policies and interests of the states by reference to the decisional, and statutory law of the states involved. Liew, 685 F.2d at 1196-97.

a. CALIFORNIA AND HAWAII HAVE DIFFERENT LAWS.

Fairechild claims that no choice of law problem exists because both Hawaii and California have reasonably identical provisions governing workers' compensation. However, a comparison of Hawaii's and California's workers' compensation statutes shows that a significant difference exists which will determine whether or not Fairechild's claim will be dismissed. Hawaii's workers' compensation law, embodied in Hawaii Revised Statutes (HRS) section 386-5 provides:

Exclusiveness of right to compensation; exception. The rights and remedies herein granted to an employee or the employees dependents on account of a work injury suffered by the employee shall exclude all oth other liability of the employer to the employee, the employee's legal representative, spouse or anyone entitled to recover damages

from the employer, at common law or otherwise on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy rela related thereto, in which case a civil action may be brought. HRS § 386-5 (1996).

HRS section 386-6 further provides:

Territorial applicability. The provision in this chapter shall be applicable to all all work injuries sustained by employees within within the territorial boundaries of the State.

If an employee who has been hired in the State suffers work injury, he shall be entitled to compensation under this chapter even though the injury was sustained without the State. The right to compensation shall exclude all other liability of the employer for damages as provided in section 386-5..HRS §386-6 (1996).

California Labor Code section 3602, while similarly providing compensation is the sole and exclusive remedy of the employee against the employer, contains an exception which in pertinent part, provides:

Exclusive remedy against employer; action for damages; conditions of employer's liability; security for payment of compensation...(b) An employee... may bring an action at law for damages against the employer as if this division did not apply, in the following instances:...

(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. Cal.Lab. Code § 3602 (West 1996) emphasis added).

The laws of Hawaii and California addressing the "exclusive remedy" for a work injury contain a significant difference. Hawaii's law provides that workers' compensation is the exclusive remedy against an employer for a 'work injury". California, however, has a statutory exception to the "exclusive remedy" provision for claims arising from an employer's alleged fraudulent concealment of a work-related injury. This action attempts to take advantage of California's "fraudulent concealment" exception to the exclusive remedy.

b. HAWAII HAS A STRONGER INTEREST IN APPLYING ITS LAW.

Since a significant difference exists between Hawaii's and California's workers' compensation statutes, the court must consider whether each state has an interest in having its law applied to the case and, if each state has has an interest,which state's interest would be more impaired if its law were not applied. In order to determine whether each state has an inte an interest in applying its exclusive remedy provision in this case, the court must look at the purpose behind each state's law. Defendant cites Paulo v.Bepex Corp., 792 F.2d 894 (9th Cir. 1986), in asserting that the

Ninth Circuit has already addressed this situation.

The dispute in Paulo arose out of a work-injury sustained by the plaintiff in an industrial accident in Ontario, Canada, where plaintiff resided. Id. DefendantBepex, a California corporation that manufactured an allegedly defective meat grinder was incorporated in Delaware and had its principal place of business in Illinois but did business in California and Ontario. Id. The Ninth Circuit, affirming the district court,held that the district court properly applied Onatrio's workers' compensation law instead of California's products liability law. Id. at 896 . In its analysis, the court determined that a conflict of laws existed and that its resolution required examination of the policies underlying the relevant law of California and Ontario, respectively. Id. The policy underlying Ontario's workers' compensation law is to provide employees benefits regardless of fault but, at the same time, to protect from tort liability all employers who contribute to its compensation pool. Id. The policies underlying California's products liability law are, first, to compensate individuals injured by defective

products and, second--in contrast to Ontario's workers' compensation law--to deter the manufacture of such products. Id. Although the court found that California had some interest in deterring the manufacture of defective products which might injure California citizens and that interest might be undermined if Ontario law were applied, the court held that California has "little interest in applying its law to compensate citizens of Ontario." Id. at 896 (emphasis added). The court concluded that the California law was significantly different from Ontario law and that Ontario's interests would be more impaired than California's interests if Ontario laws were not applied. Id At 896.

The present case is, in relevant respects, similar to Paulo. California has created an exception to its exclusive remedy provision for an employer's fraudulent concealment of a work-related injury. California however, haslittle or no interest in applying its law to protect Fairechild in this case. Fairechild is a Hawaiian resident andemployee. Thus, there is no California employee whose interests would be protected byapplication of California's workers' compensation statute.

Fairechild argues that California has an interest in applying its law to deter employers doing business in California from fraudulent concealment. United is neither incorporated in California nor has its principal place of business in California. Although United does business in California, Paulo demonstrates that this is not an overriding interest revelent to deciding choice of law. See Paulo, 792 F.2d at 895. The Paulo court found that, while California had an interest in deterring the manufacture in California of defective goods which might injure its citizens, the purpose of Ontario's law in barring the action "would be significantly undermined if this Ontario employee were permitted to pursue tort litigation against an Ontario employer". Id. at 895-96. Similarly here, examination of the purpose behind Hawaii and California workers' compensation statutes reveals that Hawaii clearly has a stronger interest in applying its law. The purpose of Hawaii's exclusive remedy provision in its workers' compensation statute is "to achieve certainty--certainty that an employee will be compensated for all work injuries regardless of his negligence or fault, and certainty with regard to the amount for which the employer shall be liable." Hanagami v. China Airlines,

Ltd., 688 P.2d 1139, 1144 (1984). To allow Fairechild to apply California law because she has now alleged fraudulent concealment great greatly impairs the purpose behind Hawaii's law in achieving final resolution of a claim.

B. HAWAII'S EXCLUSIVE REMEDY PROVISION BARS THIS ACTION

1. There is no "Fraudulent Concealment" Exception Under Hawaii Law.

Since Hawaii law applies to the present case under California's choice of law analysis Hawaii's exclusive remedy provision bars the instant action as the Hawaii statute contains no exception for alleged fraudulent concealment. At oral argument, Fairechild claimed that a recent decision handed down by the Hawaii Supreme Court, Hough v. Pacific Insurance Co. Ltd., 1996 WL 680234 (Haw. Nov. 26, 1996), greatly eroded Hawaii's exclusive remedy provision. The Hough case, however, is readily distinguishable. The plaintiff in Hough alleged a separate claim against the insurance company based on allegations that the insurer committed intentional torts and acted in bad faith in processing the worker's compensation claim, causing separate and additional injury to the worker. In contrast, the claim that Fairechild alleges is against her employer, whom she has already sued in Hawaii for the

same work injury which underlies the instant claim.

Furthermore, where a plaintiff in Hawaii sought to assert a claim for defendants' fraudulent concealment of her work injury on the theory that Hawaii should recognize an exception to its exclusive remedy statute much like California's statutory exception to its exclusive remedy provision, the court found that [t]here is...no such exception under Hawaiilaw." Wrangler v. Hawaiian Electric Co. Inc., 742 F. Supp. 1465, 1468 (D.Haw. 1990). The court found that the basis of plaintiff's claim was sexual harassment and discrimination only; any attempt to add a claim for fraudulent concealment would fail as a matter of law in light of the exclusivity provision of Hawaii's workers' compensation statute. Id. Similarly, the basis of Fairechild's claim is her work injury only, like the plaintiff in Wangler, Fairechild's fraudulent concealment claim is also barred under Hawaii's exclusive remedy provision.

2. Emotional Distress Claims Are Also Barred Under Hawaii Law

Fairechild's claim for emotional distress damages are similarly barred by the exclusive remedy provision of Hawaii's Workers' Compensation law. Emotional distress claims arising out of a work injury are barred by the workers'

compensation statute. Wangler 742 F.Supp. at 1467 (alleged intentional and negligent infliction of emotional distress arose out of alleged sexual harassment discrimination). The Wanglercourt held that

> this broad policy accomplishes the beneficial purposes of workers' compsation law. The employer is held strictly liable for misconduct in the work place and the employee has an efficient economical remedy.

Id. (citing Lui v. Inter-Continental Hotels Corp., 634 F.Supp. 684 (D. Haw.1986)).See also Courtney v. Canyon Television & Appliance Rental, Inc., 899 F. 2d 845 (9th Cir 1990) (claim for emotional distress arose out of discharge and was barred by Hawaii workers' compensation law); Howard v. Daiichiya-Love's Bakery, Inc., 714 F. Supp. 1108 (D.Haw. 1989) (holding that plaintiff's alleged emotional distress injury arising out of an age discrimination claim fit within the definition of a work-related injury and was barred by the exclusivity provision of Hawaii's workers' compensation statute).

C. CONCLUSION

This action's connection to California is tenuous at best, as the only connection alleged is that the injury occurred on a flight from Honolulu to San Francisco. Hawaii, however, is

Fairechild's residence and her place of employment. In sum, United is correct in claiming that California's choice of law analysis applies here and that, under that analysis, Hawaii's workers' compensation statute is the applicable law. Plaintiff's claim is barred under Hawaii's Workers' Compensation statute, which recognizes no exception for an employer's fraudulent concealment.

IT IS HEREBY ORDERED THAT:

1. Defendants' motion for judgment on the pleadings is granted.
2. Defendants' motion to stay the proceedings is denied as moot.

Dated: December 17, 1996

Signed:

JOAN S. BRENNAN
United States Magistrate
Judge

RECEIVED Nov. 15,96

November 4, 1996

The Honorable Ronald T.Y. Moon
Chief Justice
Supreme Court of Hawaii
417 South King Street
Honolulu, Hi. 96813

Re: Fairechild v. United Airlines, et al.
Hawaii Supreme Court
No. 18726, and
related California
action, Fairechild v.
United Airlines,
USDC No. C-96-1775 JSB

Dear Justice Moon:

I have been assigned the case of fairechild v. United Airlines, C-96-1775 JSB. which is venued in U.S. District Court for the Northern District of California. Counsel have informed me and the pleadings have stated that there is a related case pending before the Hawaii Supreme Court. No 18726.

Both actions stem from the claim of a former United Airlines flight attendant that was injured in the course of her employment as a result of exposure to insecticide in the aircraft during a process referred to as "dis insection" which is required by the governments of certain Pacific Rim countries (including Australia and New Zealand) upon the landing of commercial aircraft in those countries.

The Hawaii case is an appeal from a decision of the Labor and Industrial Relations Appeals Board (Board) denying Ms Fairechild's claim for workers' compensation benefits. The principal issues on appeal appear to be: 1) whether or not the Board erred in denying claimant's motion for reconsideration and to reopen the record, and 2) whether or not the Board erred in concluding that Ms. Fairechild did not sustain a compensable work injury.

Although the laws of both states generally provide that workers' compensation is the exclusive remedy for work-related injuries, California law provides an exception and permits a direct action against the employer where the work-related injury is claimed to have been aggravated by an employer's fraudulent concealment of the injury and its connection to the employment, in which case the employer may be liable for damages caused by the aggravation. California Labor Code Section 3602(b)(2). The action I have been assigned is based on this statute.

Defense counsel in the California has filed a motion to stay the proceedings in California pending the outcome of the Hawaii

Supreme Court appeal, contending that common issues of fact (such as whether Ms. Fairechild has sustained a work-related injury) which have been determined in the Hawaii action and are on appeal may have res judicata or collateral estoppel effect in the California action. The hearing on the motion is scheduled to take place on December 5, 1996.

Thus, the Hawaii case may be dispositive of, or have some bearing upon issues in the California action, and an expedited decision in the Hawaii appeal, to the extent this is possible, would promote judicial economy.

Thank you for your consideration.

Very truly yours,

Signed:JOAN S. BRENNAN
U.S.Magistrate

cc: Thomas J. Kaster, Esq.
Philip R. Diamond, Esq.

Seal: SUPREME COURT-THE JUDICIARY- STATE OF HAWAII
417 South King Street-Ali'Iolani Hale,
Honolulu, Hawaii 96813-2912
Telephone (808) 539-4700 Fax 539-4703

RONALD T.Y.MOON
Chief Justice

Original FILED
Dec. 03, 1996
Richard W. Wieking
Clerk U.S. Dist. Court
Northern District of Calif.

November 26, 1996

Honorable Joan S. Brennan
United States Magistrate Judge
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Your case: Fairechild v. United Airlines,Inc., et al (C-96-1775JSB)
Our Case: Fairechild v. United Airlines, Inc., et al (No. 18726)

Dear Judge Brennan:

I write in response to your November 4, 1996 letter regarding the above cited cases.

At this time, I cannot predict when our appeal will be completed. The appeal has been assigned for writing and, barring major disagreements regarding the rationale and the result, we will try to complete it within the next couple of months.

I wish I could be more definite. I have asked my staff to monitor this case, and I will write to let you know when it is completed.

Sincerely,

Signed: RONALD T.Y. MOON
Chief Justice

RTYM;snd

UNITED STATES DISTRICT COURT
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

ORIGINAL FILED
Dec 03 1996
Richard W. Wieking
Clerk, US District Court
Northern Dist. of California

December 3, 1996

Chief Justice Ronald T.Y. Moon
State of Hawai'i Supreme Court
417 South King Street
Ali'iolani Hale
Honolulu, Hawai'i 96813-2912

Re: Your case
Fairechild v. United Airlines, Inc., et al., No. 18726
(Our case
Fairechild v. United Airlines, Inc., et al., No.C-96-1775 JSB)

Dear Justice Moon:

Thank you for your letter responding to my inquiry about the case referenced above. I appreciate your keeping me informed.

Sincerely,

Signed: JOAN S. BRENNAN
United States Magistrate Judge

cc: Thomas J. Kaster
Philip R. Diamond

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

DIANA FAIRECHILD Claimant-Appellant vs. UNITED AIRLINES, INC., and PACIFIC INSURANCE COMPANY, LTD., Employer/Insurance Carrier-Appellee	CASE NO.AB 90-182 (2-89-02035)

DECISION AND ORDER

This workers' compensation case is before the Board on appeal by Claimant, DIANA FAIRECHILD, from the decision of the Director of Labor and Industrial Relations dated Feb. 23, 1990, denying her claim for compensation.

The sole issue on appeal is whether Claimant sustained an injury on December 20, 1987, arising out of and in the course of her employment.

The Board served each party with a Proposed Decision and Order on October 3, 1994. To meet the requirements of Hawaii Revised Statutes (HRS) §91-11, the parties were afforded an opportunity to file exceptions and present written arguments to the Proposed Decision and Order. On October 18, 1994, Claimant filed her exceptions and argument with accompanying exhibits, some of which were not previously made a part of the

administrative record, which was closed on September 25, 1991. Employer filed its exceptions and argument on October 19, 1994. On October 20,1994, Employer filed an objection and request to strike those portions of Claimant's exceptions that make reference to newly submitted information that were not part of the record.

Under Hawaii Laborers' Training Center v. Agsalud, 65 Haw. 257, 650 P.2d 574 (1982), the Hawaii Supreme Court stated that HRS §91-11 allows a party to have "an opportunity to present argument in written or oral form in support of its exceptions [to a proposed agency decision] and to have those exceptions considered on their merits based on the record ." (emphasis ours). On that basis, we grant Employer's request to strike and will not consider the exhibits as well as any references to new information contained in Claimant's exceptions not previously made part of the administrative record.

Having reviewed the parties, exceptions and arguments we issue the following final Decision and Order, affirming the Director's decision.

FINDINGS OF FACT

!. Claimant, DIANA FAIRECHILD, was a flight attendant employed by Pan American

World Airways (Pan AM) for about twenty years.

2. In accordance with government policy, aircrafts arriving in New Zealand or Australia from foreign soil were routinely sprayed with an insecticide called D-Phenothrin before the passengers and flight crew were allowed to deplane.

3. Claimant flew the New Zealand and Australian routes during her twenty-year employment with Pan Am. She was exposed to insecticide each time she flew on those routes.

4. In January of 1985, on a flight from Honolulu to New Zealand, Claimant's eyes became irritated after her plane was sprayed with insecticide. She also experienced headaches, feelings of disorientation, and a burning sensation in the nose, sinuses, and throat.

5. Upon her return to Honolulu, Claimant was evaluated by allergy specialist, Dr. Arthur Neilson, on January 21, 1985. Upon examination, Dr. Neilson found no stigmata of allergic disease. He opined that Claimant's reaction to the insecticide spray was not an allergic reaction, but an irritative response of the mucus membranes of the respiratory tract and the conjunctivae.

6. On February 11, 1985, Claimant sought further evaluation with Dr. George Ewing, another allergy specialist. According to Dr.

Ewing's consultative report, Claimant experienced eye itch and secretion, fatigue, lung distress, and muscle spasms after exposure to insecticide at work. Dr. Ewing noted that Claimant had a positive history for fibrocystic disease of the breast and pulmonary embolus in 1968 with resulting residual lung scars. The report also documented Claimant's professed sensitivity to tobacco smoke, newsprint, caffine, sugar, deodorants, most soaps, and perfume.

7. On February 14, 1995, using a sample of D-Phenothrin supplied by Claimant, Dr. Ewing performed provocation-neutralization test. The test involved the administration of diluted samples of D-Phenothrin to Claimant to test her reaction upon exposure to the chemical. Dr. Ewing testified that he placed three droplets of diluted D-Phenothrin under Claimant's tongue. Shortly thereafter, Claimant reacted with subjective symptoms that included shooting pains, rapid heart beat, anxiety, burning in the tongue, headaches, and pressure in the chest.

The provocation-neutralization test is sanctioned by the Academy of Otolaryngic Allergy, but not by the Academy of Allergy and Immunology. The test is also not used

or approved by conventional allergists in the medical community.

According to Dr. Ewing, the provovaation-neutralization test and Claimant's oral history confirmed her sensitivity to D-Phenothrin. On that basis, he diagnosed her with chemical sensitivity to D-Phenothrin.

8. Claimant did not lose time from work as a result of the 1985 chemical reaction. Her symptoms cleared up within a few days of the exposure.

9. On May 17, 1985, Dr. Ewing cautioned Claimant that she could ultimately develop sensitivities to other chemical aerosols if her exposure to insecticide continues.

10. After the 1985 exposure. Claimant avoided further exposures to D-Phenotrin during the remainder of her employment with Pan Am.

11. In February of 1986, Claimant became an employee of Employer, UNITED AIRLINES, INC., after it purchased Pan Am's flight routes.

12. On August 12, 1986, while on a New Zealand route, Claimant was again exposed to D-Phenothrin. During her layover in New Zealand, Claimant's eyes became irritated. She described them as looking like "golf balls", with a pus-like discharge. She slso described dark circles under the eyes, and scaley skin around the eyes.

13. Prior to August 12, 1986, Claimant had not been exposed to D-Phenothrin since January of 1985.

14 Claimant sought treatment with Dr. Simon Barclay at Auckland Medical Services on August 14, 1986. He prescribed antibotic eye drops and a cream, but made no diagnosis.

15. Claimant followed up with Dr. Wayne Wilson on August 15, 1986, upon her return to Honolulu. Dr. Wilson diagnosed blepharitis or inflamation of the eye-lids. He prescribed Maxidex solution and Naphcon A for her eyes.

16. Employer did not dispute liability for Claimant's eye problems from the August 1986 exposure, and paid all medical expenses relating thereto. Claimant's eye symptoms resolved by August 24, 1986.

17. Claimant experienced recurrent eye symptoms in September of 1986, after flights to Tokyo and New York. She attributed her symptoms to cigarette smoke on the plane, the smells of jet fuel, and residues of insecticide in the carpeting and upholstery of the planes she worked on. Although aircrafts arriving in Tokyo and New York were not sprayed with insecticide, Claimant asserted that the planes she was on had previously been sprayed and that her symptoms were precipitated by residues of insecticide that accumulated in the planes' carpeting and upholstery.

18. Claimant saw Dr. Geoffrey Davis, an ophthalmologist, on September 12, 1986. She complained of swelling of her lower lids with itching and redness in both eyes as a result of exposure to spray insecticides. Upon examination, Dr.Davis found minimal swelling of both lower lids, slight conjunctival infection with mild papillary reaction. His impression was mild stopic conjunctivitis of unclear etiology. Dr. Davis recommended treatment with steroid cream, but Claimant declined.

19. On November 26, 1986, Claimant began treatment with Dr. Gregory Yuen, a psychiatrist. According to Dr. Yuen's records, Claimant had difficulty making the transition to a new employer. She was upset with the possibility of losing her senority from Pan Am and criticized her union for not adequately addressing her concerns. She disliked Employer's "polyester" uniform, and complained about the poor air circulation in Employer's DC-10 planes, which, in her opinion, was made worse by Employer's liberal smoking policy. She also had trouble learning new work procedures and services, and getting along with her new co-workers. Besides job adjustment, Claimant also had problems with personal and familial relationships, life purpose, and depression. Dr. Yuen's impression was adjustment disorder with mixed emotional features.

20. According to his chart notes between December of 1986 and December of 1987, Dr. Yuen saw saw Claimant on a monthly basis, sometimes as many as six times per month, for a variety of problems relating to relationships with men, family members, and friends, overeating, problems with co-workers and supervisors, and stress from demanding passengers.

21. In May of 1987, Claimant received a poor job evaluation. The evaluation report stated that Claimant violated FAA rules by leaving leaving her seat during the plane's taxi, gave incorrect time information to passengers, and failed to perform first-class service in accordance with airline procedures.

22. In response to the report,Claimant's supervisor suggested that she see a therapist for her adjustmentproblems. No further action was taken by Employer.

23. On December 20, 1987, on a flight to San Francisco from Honolulu, Claimant flew on a plane that had just made stops in New Zealand and and Australia prior to landing in Honolulu. Claimant alleged exposure to D-Phenothrin on this date.

24. On December 22, 1987, Claimant saw Employer's physician, Dr. Elmer Johnson, for a cough of six days duration. There were no complaints of eye irritation. Dr. Johnson

diagnosed an upper respiratory infection.

25. Claimant was rechecked by Dr. Johnson on December 26, 1987. Dr. Johnson noted that Claimant was still coughing with moderate mucus production, and agains attributed her coughing to an upper respiratory infection. He prescribed medication and urged Claimant to see her personal physician for a release to return to work.

26. Claimant did not return to work after December 20, 1987. She continued to see Dr. Yuen for psychiatric treatment throughout 1988.

27. Claimant returned to Dr. Ewing on August 11, 1988,for re-evaluation. In response to an allergy questionaire from Dr. Ewing, Claimant indicated that in the past eight months, developed intolerance for or sensi tivity to all antibiotics, , penicillin, mycins, house dust, newsprint, tobacco smoke, perfumes, powders, insecticides, jet fuel, hair sprays, carpet, dairy products, and synthetic fabrics.

Examination on this date revealed clear skin, normal eardrums and canals, mild congestion, normal teeth and gums, mild conjunctival condition in the eyes, normal heart sounds, and clear lungs. Dr Ewing noted that Claimant was obviously stressed, anxious, and

concerned about her health.

Based on Claimant's history and her responses in the allergy questionaire, Dr. Ewing diagnosed her with multiple chemical sensi_ tivity (MCS) with chronic anxiety and depression. He recommended that Claimant avoid chemicals that could aggravate her symptoms and that she seek work in a less polluted enviornment. He saw no need for further work-up or laboratory testing.

28. Although Dr. Ewing was aware that Claimant was under psychiatric care when he saw her in 1988, he rendered his diagnosis without first inquiring into the nature and extent of her psychiatric condition and without further diagnostic work-up.

29 After Dr. Ewing diagnosed Claimant with MCS, Dr. Yuen changed his diagnosis of adjustment disorder to organic mood syndrome. Dr. Yuen testified that he now considers Claimant's emotional difficulties or mood to be a product of an organic, physical cause. Dr. Yuen conceded that the change was prompted by Dr. Ewing's diagnosis of MCS.

30. On January 24, 1989, Claimant filed a workers' compensation claim againstEmployer, alleging that she acquired the condition of MCS as a result of her exposure to D-Phenothrin

at work. Claimant claimed that her re-exposure to D-Phenothrin on December 20, 1987, upset her tolerance for the chemical, causing her to develop reactions to other non-related chemicals in the enviornment. Claimant identified December 20, 1987, the date of her last expo sure , as the date of her injury, and December 22, 1987, as the date she became totally disabled from work.

31. Claimant denies and did not make a claim for psychiatric injury.

32. Claimant testified that between August of 1986 and December of 1987, she had recurrent eye symptoms, anxiety, difficulty breathing, and motor coordination problems that have rendered her accident-prone and absent-minded. She attributed these symptoms to MCS.

33 Client currently lives in a rural area in upcountry Maui. In order to minimize chemical exposures, Claimant leads a reclusive existence, avoiding traffic and most people.

34. According to Dr. Ewing, the development of MCS follows a typical course that usually begins with a major exposure to one or more chemicals. The exposure may occur briefly at high levels or repeatedly or continuously at a lower level. Upon exposure or exposures to the chemical, victims develop or experience symptoms including but not limited to dizziness, headaches, aches and

pains, and disorientation. Overtime, they become sensitized to other related or non-related chemicals in the environment at doses far below those established to be harmful to the general population.

35. Dr Ewing admitted that there is no immunologic test to define MCS and that sufferers of MCS do not respond to conventional allergy skin testing. His diagnosis of MCS was based primarily on Claimant's accounts of cause and effect relationships between her exposure to chemicals and her resultant reactions and symptoms following the exposure. He opined that Claimant did not have MCS when he first treated her in 1985.

36. According to Dr. Ewing, the diagnosis of MCS is usually made after other illnesses or possible causes have first been eliminated or excluded.

37. Dr. John McDonnell, board certified in allergy and immunology, opined that thereis no objective scientific or medical basis to support Dr. Ewing's diagnosis of MCS, a condition also known as enviornmental illness. There was no scientific evidence to show that Claimant's initial reaction to one chemical led her to become sensitive to a host of other unrelated chemicals in the enviornment. Except

for her eye irritations, which doctors have diagnosed as blepharitis and conjunctivitis, Claimant's other symptoms were vague and subjective and unsubstantiated by objective findings. Unlike allergy sufferers, whose symptoms can be objectively and clinically verified by testing with reproducible results, thosediagnosed with MCS do not respond to conventional objective testing.

Dr. McDonnell was also critical of Dr. Ewing's diagnostic methods in this case, because Dr. Ewing accepted at face value Claimant's cause and effect associations and rendered a diagnosis based on that without further inquiry into other possible explainations for her health problems.

As for the provocation-neutralization testing, Dr. McDonnell opined that the test was conducted with flawed methodology, and, therefore, invalid.

According to Dr. McDonnell, numerous double blind controlled studies have been conducted to test the claims of those who advocate the theory of enviornmental illness or MCS as an organic illness. Thus far, no scientific study published in conventional scientific peer-reviewed medical literature has been able to prove that enviornmental illness or MCS actually exists. In Dr. McDonnell's opinion, MCS is a philosophy or belief that

has gained anecdotal notoriety in lay and non-peer-reviewed medical literature, but remains unsubstantiated by scientifically sound research.

Dr. McDonnell conceded that Claimant may have initially developed irritative reaction from insecticide at work resulting in blepharitis or conjunctivitis in 1985 and 1986. He opined, however, that Claimant did not suffer any organic injuryfrom exposure to insecticide beyond that of an eye irritation. We credit Dr. McDonnell's opinions.

38. Dr. Eric Comstock, a medical toxicologist, opined that the existence of environmental illness or MCS has not been scientifically proven. Dr. Comstock acknowledged that Claimant may have suffered an eye irritation in the form of blepharitis or conjunctivitis following her exposure to insecticide spray. He opined, however, that Claimant does not currently suffer from any organic illness as a result of her chemical exposure at work. Dr. Comstock diagnosed Claimant's current condition as an iatrogenic chemophobic anxiety reaction to chemicals. The condition causes her to experience heart palpitations, sweating, and feelings of avoidance whenever she is exposed to chemicals. He opined that Claimant's current and ongoing morbidity is perpetuated by the practice of chemical avoidance advo-

cated by her physician. We credit Dr. Comstock's opinions.

39. The diagnostic methods and treatment of MCS, which Dr. Ewing subscribes to and used in this case, have not been proven reliable, effective, or scientifically valid. For that reason, neither the American Academy of Allergy and Immunology nor conventional allergists in the medical community recognizes the concept of MCS.

CONCLUSIONS OF LAW

We conclude that Claimant did not sustain an injury on December 20, 1987, arising out of and in the course of employment.

Claimant contends that she should prevail on her claim given the divergent medical evidense on MCS and the force of the presumption of compensability under HRS §386-85. We disagree.

We have previously stated that, in a case where compensability is at issue, a claimant may not avail himself to the statutory presumption that an injury arose from employment, unless the injury or evidence of such has first been established. Gary P. Adric v. Kiewit Pacific Company, AB 90-92(K) (June 2, 1992); see also, 2C Larson, The Law on Workers' Compensation, §80.33(a) (1993) (statutory presumption does not apply until claimant first establishes the facts required to invoke the

presumption). Therefore, before we can even apply the presumption to determine causation in this case, we must first determine whether Claimant has an injury.

In appropriate circumstances, an injury can be established by lay testimony without medical evidence. 2B Larson, The Law on Workers' Compensation §79.51(b) (1993). "For example, if an employee falls at work and cuts his arm, then medical evidence is not normally necessary to prove thatthe employee has sustained an injury." Cardyn v. Workmen's Comp.App. Bd. 534 A.2d 1390 (Pa. 1987). However, in some cases, it is impossible to discuss causation of an injury without first analyzing in medical terms what the injury or disease is. 2B Larson, supra, at §79.51(a). According to Professor Larson, the general rule is "if the physical causal sequelae between accident and injury is sufficiently impressive, then the lack of a precise diagnosis or etiology can usually be excused". 2B Larson, supra, at §79.51(d). However, "as the degree of complexity of the medical issues increases, so does the degree of thoroughness and definitemess of diagnosis". 2B Larson, supra , at §79.54(i). In these situations, a diagnosis, based upon reliable and proven medical and scientific criteria, is, in our view, necessary to establish the injury for which the employee claims compensation.

In this case, Claimant alleges a condition that took more than twenty years to evolve, but did not fully develop until December of 1987. The nature of Claimant's alleged injury describes neither a systemic disease nor an acute illness evidenced by a demonstrable organic pathology. Instead Claimant alleges an allergic condition to a variety of common everyday chemicals and substances that is manifested by an assortment of recurring subjective complaints which she claims to have resulted from exposures to a single chemical at work. We find that the complexity of the medical problem alleged in this case requires that the claimed injury be established by a diagnosis based upon reliable and proven scientific or medical criteria.

On the record before us, we conclude that the claimed injury has not been established due to the lack of reliable orproven medical or scientific basis to support or confirm the diagnosis of MCS. The record shows that Dr. Ewing based his diagnosis primarily on the oral history presented by Claimant and his whole-hearted acceptance of the given history as fact. There were no objective findings to substantiate Claimant's subjective symptoms. Although Dr. Ewing maintained that MCS is a diagnosis made by exclusion of other illnesses or affections, he himself made no efforts to

to rule out other possible causes for Claimant's complaints. Hence, there was no clear evidence that Claimant's symptoms were, in fact related to allergy, sensitivity, toxicity, or any other type of reaction from chemicals.

Although Dr. Ewing performed a provocation-neutralization test in 1985, the test, setting aside for the moment Dr. McDonnell's charges of invalidity, proved at best that Claimant was allergic or sensitive to D-Phenothrin. It did not establish MCS. Even Dr. Ewing agreed that Claimant did not have MCS in 1985.

In any case, the diagnostic methods used by Dr. Ewing in this case has not been proven to be reliable, effective, or scientifically valid. Therefore, for this and all of the above reasons, we are unable to accept his diagnosis of MCS.

Accordingly, having concluded that Claimant has failed to establish the injury for which she claims compensation, we are unable to to conclude that Claimant sustained an injury on December 20, 1987, as a result of exposure to D-Phenothrin at work. At most, Claimant has proven that she suffered anirritative reaction to D-Phenothrin, in the form of blepharitis and conjunctivitis, when she was exposed in 1985 and 1986. There was no evidence that she

suffered a similar reaction on December 20, 1987.

The record does show that Claimant suffered from an upper respiratory infection with coughing and minimal mucus production on December 20, 1987. However, according to Dr. Johnson's records, the condition began four days prior to that date. That being the case, neither Claimant's respiratory infection nor her her coughing symptoms could have been related to her work on December 20, 1987.

ORDER

The decision of the Director dated February 23, 1990, is hereby affirmed, in accordance with the foregoing findings of fact, conclusions of law, and chapter 386 of the Hawaii Revised Statutes

Dated: Honolulu, Hawaii, Nov.2,1994

Signed: FRANK YAP, JR,Chairman

CAROL K. YAMAMOTO, Member

CHARLES T. AKAMA, Member

Appendix "F"

CONSTITUTIONAL PROVISIONS
STATUTES AND RULES INVOLVED

AMENDMENT XIII: Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party has been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

AMENDMENT XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

HAWAII REVISED STATUTES

HRS Section 386-5 Exclusiveness of right to compensation; exception. The rights and remedies herein granted to the employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of injury, except for sexual harassment of sexual assault and infliction of emotional distress or invasion or privacy related thereto, in which case a civil action may also be brought. (Underlined portion was added by the Laws of 1992, Act 275.)

HRS Section 386-6: Territorial applicability. The provision of this chapter shall be applicable to all work

injuries sustained by employee within the territorial boundaries of the State.

If an employee who has been hired in the State suffers work injury, he shall be entitled to compensation under this chapter even though the injury was sustained without the State. The right of compensation shall exclude all other liability of the employer for damages as provided in Section 386-5. All contracts of hire of employees made within the State shall be deemed to include an agreement to that effect...

CALIFORNIA LABOR CODE

Section 3602. Exclusive remedy against employer; action for damages; condition of employer's liability

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee and his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

(b) An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:

(1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.

(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.

RULE 35. OPINIONS

(a) Classes of Opinions. Opinions may be rendered by a designated judge or justice, or may take the form of per curiam or memorandum opinions.

(b) Publication. Memorandum opinions shall not be published.

(c) Citation. A memorandum opinion shall not be cited in any other action or proceeding except when the opinion establishes the law of the pending case res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

(d) Mailing by Clerk. The clerk shall promptly mail all parties a copy of the opinion.

NO. 18726

IN THE SUPREME COURT OF THE STATE OF HAWAII

DIANA FAIRECHILD, Claimant-Appellant vs. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured and PACIFIC INSURANCE COMPANY Insurance Adjuster Appellee	CASE NO. AB. 90-182 (2-89-02035) SUPPORTING AFFIDAVIT

SUPPORTING AFFIDAVIT

STATE OF HAWAII)
) SS
CITY AND COUNTY OF HONOLULU)

JOSEPH A. RYAN, being duly sworn deposes and says:

1. He is an attorney for Claimant-Appellant and he makes this affidavit in support of her Motion for Reconsideration.

2. Attached hereto for the convenience of the Court in considering this motion, and marked Exhibit "A" is a true and correct copy of the Order Granting Defendants' Motion for

Judgment on the Pleadings, executed by Joan S. Brennan, UnitedStates Magistrate Judge, United States District Court, Northern District of California, on December 17, 1996, and filed with the Clerk of said Court on December 23, 1996, in No. C-96-1775 JSB, Diana Fairechild, Plaintiff, vs. United Airlines, Inc., et al,Defendant.

3. Attached hereto is a true and correct copy of a communication from the Office of Hon. Patsy T. Mink, a Member of the House of Representatives from Hawaii to which is a true and correct copy of a communication from the Department of Health and Human Services concerning the national interest in the problems caused by Multiple Chemical Sensitivity (MCS) and said matter is marked as "Exhibit "B".

4. Affiant verily believes that it was an incident of slavery and involuntary servitude for a master to intentionally whip, or otherwise physically injure a slave or peon with impunity.

5. Affiant verily believes that the law of Hawaii and of the United States via the Thirteenth and Fourteenth Amendments prohibit an employer from intentionally poisoning an employee in the course of employment.

6. Affiant respectfully suggests to the Court that the Memorandum Opinion in this case denies the injured employee the Equal Protection of the Law as well as liberty and property rights without due Process of Law.

Further Affiant sayeth naught.

Signed:

JOSEPH A. RYAN

Subscribed and sworn to before me
this 27th day of January, 1997.

S/ Mike Kelly
Notary Public, State of Hawaii

My commission expires 8/19/97.